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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOAN MARGARET ROSE ANDERSON, Plaintiff and Respondent, v. HENRY ALEX SMITH, Defendant and Appellant.	B282973 (Los Angeles County Super. Ct. No. BQ057480)

APPEAL from an order of the Superior Court of Los Angeles County, James E. Blancarte, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Geoffrey Ojo for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Joan Margaret Rose Anderson petitioned the trial court to issue a restraining order against Henry Alex Smith under the Domestic Violence Prevention Act (DVPA; Fam. Code,[1] § 6200 et seq.). Anderson's registered process server filed both a proof of service reflecting personal service on March 27, 2017, of the petition and related documents on Smith, and an amended proof of service reflecting personal service, on that date, of the petition and related documents on "Smith/Atty Geoffrey Ojo Bar #189211," an attorney representing Smith in his separate civil action against Anderson. At an April 13, 2017 hearing that Smith did not attend, the trial court stated it had valid proof of service and issued a restraining order after the hearing. On appeal, Smith claims the process server did not properly serve him with the petition, the hearing notice and related documents; therefore, the trial court's issuance of the restraining order violated his right to procedural due process and was improper because the court lacked personal jurisdiction over him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 24, 2017, Anderson, in pro. per., filed a petition for a domestic violence restraining order. Anderson sought protection from Smith, with whom she had formerly cohabited in her house on Palmero Boulevard in Los Angeles. Anderson requested orders prohibiting Smith from, inter alia, harassing and/or contacting Anderson and a stay away order. Anderson

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[1] Unless otherwise indicated, subsequent statutory references are to the Family Code.

also sought exclusive temporary control over the Palmero Boulevard property.

Anderson supported her petition with an unsigned, purported declaration dated March 22, 2017,[2] wherein she stated that from 1999 through 2016, Anderson and Smith lived in Anderson's house. During this period, Smith had repeatedly assaulted, assaulted with a gun, falsely imprisoned, forcibly raped, sodomized, and threatened to kill Anderson. Smith moved out of the house after he married another woman. In December 2016, Smith forcibly entered the house and tried to rape Anderson. From October 2016 to March 22, 2017, he repeatedly called her and told her she was going to die.

In February 2017, Smith came to Anderson's home and told her, " 'I will get your property and do whatever it takes, even death!' " He said he would take her one night to a dark alley, he was a detective in Belize, he knew how to " 'cover [his tracks],' " and he would destroy her. He also threatened to beat her. Smith regularly stalked her and constantly called her, telling her that she was going to die.

Anderson attached to the restraining order petition a copy of a civil complaint filed in December 2016 by Attorney Geoffrey Ojo on behalf of Smith (*Smith v. Anderson* (Super. Ct. L.A. County, 2017, No. BC643091)). In that civil action, Smith sought, inter alia, an interest in the Palmero Boulevard property. Anderson also attached to the petition her January 2017 answer to the complaint, filed in pro. per.: wherein she denied that Smith

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[2] Anderson signed the petition, which referred to the purported declaration as an attachment, under penalty of perjury.

had any interest in the property. The answer included her declaration executed on December 28, 2016.

On March 24, 2017, the trial court in the instant case issued a temporary restraining order (TRO) and scheduled a hearing for April 13, 2017. The court also issued a notice of court hearing.

On March 28, 2017, Antonio Salone, a registered process server, filed a proof of personal service. He stated that at 2:51 p.m. on March 27, 2017, he "personally gave copies" of the petition for domestic violence restraining order, a blank response to the petition, the notice of court hearing, and the TRO to "Henry Alex Smith." The proof of service stated Salone effected this at 5777 West Century Boulevard, Suite 750, in Los Angeles.

On April 7, 2017, Salone filed an amended proof of personal service. This proof of service was substantially the same as the one filed on March 28, 2017, except the amended proof identified the "Party to be Restrained" as "Henry Alex Smith/Atty Geoffrey Ojo Bar #189211" and stated that Salone had given copies of the various documents to that party. Each proof of service utilized a Judicial Council of California DV-200 form.[3]

At the April 13, 2017 hearing on the petition, Attorney Howard Lynch represented Anderson. Smith did not attend the hearing. The court stated that it had "a valid proof of service," and the hearing would proceed in Smith's absence.

Anderson ratified under oath her March 22, 2017 declaration as true and correct. The court indicated that it had read that declaration and Anderson's December 28, 2016

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[3] The forms indicated they were the "[r]evised July 1, 2016, Optional Form," and based on sections 243, 245, and 6345.

declaration. The court granted Anderson's petition, finding she had proven "well beyond a mere preponderance of the evidence" that Smith had "engaged in a course of conduct over a matter of several years which include[d] physical abuse, verbal abuse, threats of further physical abuse, attempts at extortion, possible extortion, unlawful trespass, among other acts which all fall within the meaning of . . . section 6203."

Later during the hearing, the court observed that Anderson had asked for exclusive control of the Palmero Boulevard property and the court asked if she owned it. She testified that she did, Smith had attempted to change the deed, and his effort in a palimony suit to acquire the property had been unsuccessful. The restraining order is on a standardized form, a portion of which permits the court to issue an order pertaining to "Property Control." In the instant restraining order, the court granted Anderson exclusive control over the Palmero Boulevard property. The restraining order protected Anderson and her son until April 13, 2022.

On June 2, 2017, Ojo, representing Smith, filed a notice of appeal.[4] Ojo attached his declaration dated May 2, 2018 to Smith's opening brief. In it, Ojo stated that Smith retained him as counsel in the civil case pending on March 28, 2017 and dismissed on June 23, 2017 (*Smith v. Anderson*, *supra*, No. BC643091). Ojo did not represent Smith in the trial court in this

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[4] A domestic violence restraining order is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(6), which permits an appeal "[f]rom an order granting . . . an injunction . . . ." (See *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1498, 1502, fn. 9.) "A domestic violence restraining order is a type of injunction . . . ." (*Id*. at p. 1503.)

case; he never appeared on Smith's behalf and Smith did not authorize Ojo to receive service of process on Smith's behalf in this case. On March 27, 2017, Salone left the TRO and notice of court hearing "with the front-office staff" at Ojo's law office address, 5777 West Century Boulevard, Suite 750, in Los Angeles. That was not the address of Smith's residence or usual place of business. Neither Ojo nor Smith was present when Salone left the documents at Ojo's office.

DISCUSSION

Smith asserts that because Anderson's process server did not personally serve Smith with the TRO and notice of court hearing, the trial court's issuance of the restraining order violated Smith's right to procedural due process and thus the court lacked personal jurisdiction over him. We disagree.

The DVPA "permits the trial court to issue a protective order 'to restrain any person for the purpose' of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved; the petitioner must present 'reasonable proof of a past act or acts of abuse.' (§ 6300.)" (*Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 820.) The court may issue a protective order after notice and a hearing. (§ 6340, subds. (a) & (b).)

"The procedure for obtaining an ex parte temporary restraining order is set forth in section 240 et seq." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1494.) Section 243, subdivision (a), governs service of a TRO and other documents prior to a noticed hearing on the petition. It states: "If a petition under this part has been filed, the respondent shall

be *personally* served with a copy of the petition, the temporary restraining order, if any, and the notice of hearing on the petition. Service shall be made at least five days before the hearing." (Italics added.)

An order is void where it was obtained in violation of a party's due process rights to notice and an opportunity to be heard, or where the court lacked jurisdiction over the defendant. (Cf. *Brown v. Williams* (2000) 78 Cal.App.4th 182, 186, fn. 4.) "Proper service is a requirement for a court's exercise of personal jurisdiction. [Citation.]" (*Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863.)

Anderson, as plaintiff, had " 'the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service.' [Citation.]" (*American Express Centurion Bank v. Zara* (2011) 199 Cal.App.4th 383, 387.) Smith concedes the filing of a proof of service that complies with the applicable statutory requirements "creates a rebuttable presumption that the service was proper." (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795.)

California Rules of Court, rule 1.35(a), states: "Forms approved by the Judicial Council for optional use, wherever applicable, may be used by parties and must be accepted for filing by all courts." Rule 1.35(b), states: "Each optional Judicial Council form appears without an asterisk (*) on the list of Judicial Council forms in Appendix A to the California Rules of Court. . . ." Accordingly, each such form may be used by parties and must be accepted for filing by all courts. Rule 5.7(a), states: "All forms adopted or approved by the Judicial Council for use in any proceeding under the Family Code, including any form in the . . . DV . . . series, are adopted as rules of court under the

authority of Family Code section 211; article VI, section 6 of the California Constitution; and other applicable law." DV-200 is such an optional form appearing without an asterisk. (Cal. Rules of Court, Appendix A, Judicial Council Legal Forms List (Domestic Violence Prevention).)

The proof of personal service and amended proof of personal service "DV-200" forms filed in this case on March 28 and April 7, 2017, respectively, were Judicial Council optional forms used for proof of service of domestic violence TROs. Salone filled out completely both proofs of service, identifying himself as a registered process server who personally served the petition for domestic violence restraining order, a blank response to the petition, the notice of court hearing, and the TRO on Smith, at the 5777 West Century Boulevard address.

The March 28, 2017 proof of service reflects that Salone personally served Smith, and the April 7, 2017 amended proof of service reflects Salone personally served "Henry Alex Smith/Atty Geoffrey Ojo Bar #189211," at the Century Boulevard address. The proof of service form simply required Salone to specify the address at which he personally gave copies of documents to the party identified. It did not require Salone to state the nature (residential, commercial, or otherwise) of the location at that address. Unsurprisingly, the proofs of service did not provide additional information about the nature of the location at the Century Boulevard address, and thus do not themselves establish one way or the other whether, e.g., the address was that of Smith's residence, Ojo's business, or something else.

Notwithstanding Smith's suggestion to the contrary, nothing within the four corners of the proofs of service demonstrates Salone simply left documents at the Century

Boulevard address, left them there with staff at a business belonging to Ojo or anyone else, or did not properly and personally serve Smith at that address. Indeed, Smith characterizes both proofs of service as "purporting to claim that [Smith] was personally served."

That the amended proof of service reflects that Salone personally served "Henry Alex Smith/Atty Geoffrey Ojo Bar #189211" is not inconsistent with Salone personally serving Smith, as reflected in the initial proof of service. Nor did the amended proof of service state that it superseded the previous proof of service and its averment that Salone personally served Smith.

The filing of the proofs of service, which complied with the applicable statutory requirements, created a rebuttable presumption that the underlying service was proper. (*Floveyor Internat., Ltd. v. Superior Court*, *supra*, 59 Cal.App.4th at p. 795.) The presumption was unrebutted.[5] We presume the trial court knew and followed the law. (Evid. Code, § 664; *Hilton v. Superior Court* (2014) 239 Cal.App.4th 766, 783-784.) There is no dispute that if the trial court had valid proof of service and Salone personally served Smith, the issuance of the restraining order did not violate Smith's right to procedural due process and was not improper on the ground the court lacked personal jurisdiction over him.

None of Smith's arguments, or the cases he has cited, compel a conclusion that Smith was not properly served. Smith argues Ojo's declaration attached to Smith's opening brief proves

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[5] As indicated *post*, Ojo's declaration attached to Smith's opening brief does not rebut the presumption.

Salone did not personally serve Smith. We reject that argument. " '[I]t has long been the general rule and understanding that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration." [Citation.]' " (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 442.) For this reason, "documents not before the trial court cannot be included as part of the record on appeal and thus must be disregarded as beyond the scope of appellate review. [Citations.] Likewise disregarded are statements in briefs based on matter[s] improperly included in the record on appeal." (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

Accordingly, "[a]ffidavits attached to an appeal brief which were not presented to the trial court are not part of the record on appeal [citations]," and "matters not presented by the record cannot be considered on the suggestion of counsel in the briefs [citations] . . . ." (*People v. Shaffer* (1960) 182 Cal.App.2d 39, 45-46; see also Cal. Rules of Court, rule 8.204(a)(2)(C) [an appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record"].)

We must therefore disregard Ojo's declaration attached to Smith's opening brief and disregard the opening brief's references to that declaration, as no one presented that declaration to the trial court and it is not part of the record on appeal.

Smith relies on *American Express Centurion Bank v. Zara*, *supra*, 199 Cal.App.4th 383 for the proposition he is entitled to rely on Ojo's declaration to dispute the averment in Salone's proofs of service and to support Smith's claim that Salone did not personally serve him. Smith's reliance is misplaced.

The defendant Zara disputed factual statements in the plaintiff's proof of personal service, but not by a declaration of his counsel, which was presented for the first time on appeal. Instead, Zara disputed the statements in the trial court via a declaration from Zara himself, as part of his motion to quash the plaintiff's service of summons and complaint. (*American Express Centurion Bank v. Zara*, *supra*, 199 Cal.App.4th at pp. 386-388.) Moreover, Zara's declaration aside, when Zara appeared at the hearing on the motion, it became obvious that he and the person described in the plaintiff's proof of personal service were not the same person. (*Id.* at p. 390, fn. 2.) Here, Smith made no motion to quash service of process in the trial court nor did he file a motion to set aside the order for lack of jurisdiction, which would have allowed the court to consider evidence as to whether Salone actually served Smith personally. Smith's remedy, at least in the first instance, was in the trial court.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.